

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PHYLLIS BAKER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
SF07528810665

DATE: JUN 06 1989

Phyllis Baker, Newport Beach, California, pro se.

Elizabeth A. Hacker, Laguna, Niguel, California, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the September 30, 1988 initial decision sustaining her removal. Because we find that the appellant has failed to establish good cause for the untimely filing of her petition for review, we DISMISS the petition.

BACKGROUND

The appellant appealed to the Board's San Francisco Regional Office from the agency action removing her from her position of Editorial Assistant (Typing) on charges of unprofessional conduct causing embarrassment to the service and insubordination. In the initial decision, the administrative judge sustained the agency action and informed the appellant that the initial decision would become final unless a petition for review was filed with the Board by November 4, 1988. See Initial Decision at 7.

By submission postmarked November 4, 1988, the appellant requested an extension of time for filing her petition for review. See Petition for Review (PFR) File, Tab 1. By order dated November 9, 1988, the Board granted the appellant until November 23, 1988, to file her petition for review. *Id.* at Tab 2. The Board informed the appellant that, if a petition for review was not filed by that date, the administrative judge's initial decision would remain the final decision of the Board and any further right of appeal she had would have to be exercised in accordance with the provisions of that decision. *Id.*

The appellant's petition for review¹ was postmarked November 25, 1988, and received by the Board on December 2,

¹ The agency has responded in opposition to the petition for review.

1988. See *id* at Tab 4. Under the Board's regulations, the postmark date is considered the date of filing for a mailed submission. See 5 C.F.R. § 1201.114(d). Thus, the appellant's petition for review was untimely by two days.² Consequently, the Board directed the appellant to show good cause for the untimely filing. See PFR File, Tab 5.

In response to the Board's directive, the appellant asserted that, on November 23, 1988, she deposited her petition in a United States mailbox near her home. She alleged that she had planned to mail her letter that morning but delayed doing so until she had consulted "with someone" regarding her case that afternoon. She further alleged that, on her way to mailing her petition, she was caught in a rainstorm and was unable to walk the four blocks to the post office. Therefore, she deposited the mail in the mailbox close to her home.

ANALYSIS

In *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980), the Board set out some of the factors to be

² We note that, on November 10, 1988, the appellant submitted a copy of a request she filed with the Equal Employment Opportunity (EEO) office of her agency for review of her allegations of age and sex discrimination. The submission is addressed directly to that office, and there is no indication that the appellant intended that the Board consider it as part of her petition for review. Rather, the appellant's clear and accurate filings with the Board and with the EEO office demonstrate that she was not confused and that she intended that submission to be considered only by the agency. Moreover, when given the opportunity to explain the untimeliness of her petition for review, the appellant did not assert that the letter was intended to be the petition. Therefore, we will not consider it.

considered in determining whether an appellant has established good cause for an untimely filing of a petition with the Board. The appellant's stated reasons do not establish good cause for her untimely filing. The Board's November 9, 1988 order specifically informed the appellant that her petition had to be filed on or before November 23, 1988. We note that the appellant delayed until the last possible moment to file both her request for an extension of time and her petition for review. Thus, it appears that the appellant was well aware that, if she mailed her petition, it had to be postmarked by November 23, 1988, in order to be considered timely under the Board's regulations.

By delaying the filing of her petition until the eleventh hour, the appellant bore the risk that unforeseen circumstances could prevent the timely filing of her petition. The appellant's actions in this regard did not demonstrate the exercise of diligence or ordinary prudence. *Id.* Therefore, the appellant has failed to show good cause for the untimely filing of her petition for review.

Under these circumstances, we find no good cause for a waiver of the Board's time limits for filing the petition for review in this case. See *Shiflett v. United States Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988) (the Board may grant or deny the waiver of a time limit for filing an appeal, in the interest of justice, after considering all the facts and circumstances of a particular case).

ORDER

Accordingly, we DISMISS the appellant's petition for review as untimely.

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to the merits of this case. See 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board